PERWIRA AFFIN BANK BHD

v.

SARDAR MOHD ROSHAN KHAN

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-02-722-07]
29 DECEMBER 2010

CIVIL PROCEDURE: *Action - Dismissal of - Pleading - Statement of claim adverting to cause of action in negligence - Admission by plaintiff that there was no cause of action in tort against defendant - Effect and repercussion - Whether cause of action in tort abandoned - Whether substratum of claim extirpated - Whether claim to be dismissed*

The plaintiff (the respondent) alleged that the 1st defendant bank (the appellant) was negligent in allowing a wrongful withdrawal of monies against its overdraft account, and further in uplifting a sum of RM231,393 pledged by him as a set-off against the account, and in the circumstances, filed a suit against the appellant *inter alia* for the refund of the monies. It was not in dispute that by his pleading the plaintiff spoke substantively of the 1st defendant's negligence, and there was virtually nothing in the statement of claim that indicated that the claim was one based on contract. Before the learned judge below, the plaintiff affirmed that his claim was not founded on tort but in contract, and even admitted that he had no cause of action in tort against the 1st defendant. This notwithstanding, judgment was somehow entered for the plaintiff presumably for a claim in tort, and a refund of the sum of RM231,393 was ordered against the first defendant. In this appeal by the 1st defendant bank, the plaintiff reiterated his stand that it was perfectly in order for the learned judge to have decided the way he did, considering the words "no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed" – in O. 15 r. 16 Rules of the High Court 1980 ('RHC'). It was further the plaintiff's stand that, the non-plea of action in contract notwithstanding, he was entitled, upon

A the provision of O. 15 r. 6 RHC, to apply for and obtain a declaratory judgment and an order that the 1st defendant refund the said sum of RM231,393, based on the 1st defendant's breach of contract. The 1st defendant bank however retorted that the claim, which was based on negligence, ought to be dismissed as
B the plaintiff had effectively abandoned the same. These being the arguments brought forth before the court, it thus fell upon the learned justices of appeal herein to deliberate on and resolve the question of whether the plaintiff's action, by reason of his admissions aforesaid, had been denuded of its substratum as to
C render it utterly unsustainable in law.

Held (allowing appeal; substituting order of High Court accordingly)

Per Low Hop Bing JCA delivering the judgment of the court:

D **(1)** While no action shall be open to objection on the ground that a merely declaratory judgment or order is sought, as per the provision of O. 15 r. 16 RHC, it must be emphasized that the power of the court in this regard, though unlimited, is discretionary. This power must be exercised judicially, based
E on established judicial principles, in the light of the facts and circumstances prevailing in each particular case, including the pleadings by which the parties are bound. Further, the exercise of the discretionary power must not be unprincipled. It follows that in this connection, the declaratory judgment or
F order sought in the plaintiff's prayer must not be construed in isolation. It must instead be construed conjunctively with the plaintiff's statement of claim in its entirety. (para 21)

(2) The relevant averments in the plaintiff's statement of claim
G essentially pleaded that the defendant had negligently allowed Sallim to cash the cheque for RM300,000 belonging to the Limited Company without the signature of the second defendant, that despite its said negligence, the 1st defendant had uplifted the relevant fixed deposit receipt and reduced the
H overdraft facility of RM300,000, that the 1st defendant was negligent in accepting the letter from the second defendant for the purpose of uplifting the fixed deposit, and that the 1st defendant was negligent in honouring the cheque in question. As the omnipotent words 'negligently', 'negligence' and

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'negligent' appear in the relevant paragraphs of the plaintiff's statement of claim, it is as clear as crystal that the plaintiff's statement of claim is an illustration of a classic case based on the tort of negligence, and not on a breach of contract. Indeed, the expression 'breach of contract' had never appeared at all in the pleadings. (paras 22 & 23)

(3) Given the plaintiff's express and repeated admission that his claim against the 1st defendant was not based on the tort of negligence and that the plaintiff had no cause of action in tort against the 1st defendant, the plaintiff has unequivocally abandoned his claim based on the tort of negligence. This abandonment must be viewed in the light of the plaintiff's pleaded case, which was firmly founded on the tort of negligence. Plainly, the plaintiff's express and repeated admission has removed the substratum of his claim. (paras 25 & 26)

(4) In the circumstances, we would not agree with the decision of the trial judge giving judgment for the plaintiff based on the tort of negligence, and further, answer the above question in the affirmative. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif (responden di sini) mendakwa bahawa defendan pertama bank (perayu di sini) cuai kerana membenarkan pengeluaran wang secara salah dari akaun overderaf beliau, dan mengangkat sejumlah RM231,393 dari cagaran yang disediakan oleh beliau sebagai set-off terhadap akaun, dan berikutnya telah memfailkan tindakan terhadap perayu antara lain bagi mendapatkan kembali wang tersebut. Tidak dinafikan bahawa melalui plidingnya plaintif secara substantif bercakap mengenai kecuaian defendan pertama, dan tiada suatu pun dalam pernyataan tuntutannya yang menunjukkan bahawa tuntutan adalah berasaskan kontrak. Di hadapan yang arif hakim di bawah, plaintif mengesahkan bahawa tuntutannya bukan didasarkan kepada tort tetapi kepada kontrak, dan malah mengakui bahawa beliau tidak mempunyai apa-apa kausa tindakan di dalam tort terhadap defendan pertama. Walau apapun, penghakiman yang berasaskan kepada tindakan tort telah dimasukkan untuk plaintif, dan perintah dibuat terhadap defendan pertama bagi pembayaran balik jumlah RM231,393. Dalam rayuan oleh defendan pertama bank di sini, plaintif mengulangi pendiriannya bahawa ianya adalah

A teratur bagi yang arif hakim untuk membuat keputusan sepertimana yang dicapainya, disebabkan oleh peruntukan "tiada tindakan atau prosiding lain boleh terbuka kepada bantahan atas alasan bahawa hanya suatu penghakiman atau perintah pengisytiharan dipohon, dan mahkamah boleh membuat apa-apa akuan hak yang mengikat B sama ada atau tidak relif berbangkitan ada atau boleh dibuat" – di dalam A. 15 k. 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Juga menjadi pendirian plaintif bahawa, walaupun dengan ketiadaan pli mengenai kontrak, beliau masih berhak, dengan mengambilkira peruntukan A. 15 k. 16 KMT, untuk memohon dan C mendapatkan penghakiman pengisytiharan dan perintah supaya defendan pertama mengembalikan jumlah RM231,393 tersebut, berdasarkan pelanggaran kontrak oleh defendan pertama. Defendan pertama bagaimanapun membalas bahawa tuntutan yang diasaskan kepada kecuaian harus ditolak, kerana tuntutan tersebut D secara efektifnya telah ditinggalkan oleh plaintif. Berdasarkan hujah-hujah yang dikemukakan kepada mahkamah, maka menjadi kewajipan yang arif hakim-hakim rayuan di sini untuk mengupas dan menjawab persoalan sama ada tindakan plaintif, disebabkan oleh pengakuannya di atas, telah hilang tapak asasnya sehingga E menjadikannya tidak lagi boleh dipertahankan di sisi undang-undang.

Diputuskan (membenarkan rayuan; menggantikan perintah Mahkamah Tinggi sekadarnya):

F **Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:**

(1) Sementara tiada tindakan boleh terbuka kepada bantahan atas alasan bahawa hanya suatu penghakiman atau perintah deklaratori dipohon, sepertimana peruntukan A. 15 k. 16 G KMT, ianya harus ditekankan bahawa kuasa mahkamah dalam perkara ini, walaupun tidaklah tanpa had, adalah bersifat budibicara. Kuasa ini harus dilaksanakan dengan penuh kehakiman, berdasarkan prinsip-prinsip mantap kehakiman, dan dengan mengambilkira fakta dan keadaan sekeliling sesuatu kes, H termasuk pliding-pliding yang mengikati pihak-pihak. Selain itu, pelaksanaan kuasa budibicara ini juga tidak harus tidak berprinsip. Ianya mengikut bahawa dalam hubungan ini penghakiman atau perintah pengisytiharan yang dipohon oleh plaintif tidak boleh ditafsirkan secara bersendirian. Ia sebaliknya I harus ditafsirkan secara konjunktif dengan pernyataan tuntutan plaintif secara keseluruhannya.

(2) Pengataan-pengataan relevan di dalam pernyataan tuntutan plaintif secara intinya memplidkan bahawa defendan dengan cuainya telah membenarkan Sallim untuk menunaikan cek kepunyaan Syarikat Berhad berjumlah RM300,000 tanpa tandatangan defendan kedua, bahawa walaupun dengan kecuaiannya tersebut, defendan pertama telah mengeluarkan resit simpanan tetap yang berkenaan dan mengurangkan kemudahan overderaf RM300,000 tersebut, bahawa defendan pertama cuai dalam menerima surat dari defendan kedua bagi maksud pengeluaran simpanan tetap, dan bahawa defendan pertama cuai dalam menunaikan cek berkaitan. Memandangkan perkataan keramat 'dengan cuainya', 'kecuaian' dan 'cuai' wujud dalam perenggan-perenggan pernyataan tuntutan plaintif, adalah jelas sejelas-jelasnya bahawa pernyataan tuntutan plaintif adalah merupakan contoh klasik suatu kes yang diasaskan dengan kukuhnya atas tort kecuaian, dan tidak kemungkiran kontrak. Malah, ekspresi 'kemungkiran kontrak' langsung tidak wujud dalam pliding-pliding.

(3) Mengambilkira pengakuan ekspres dan berulangkali plaintif bahawa tuntutannya terhadap defendan pertama adalah tidak berasaskan tort kecuaian dan bahawa beliau tidak mempunyai apa-apa kausa tindakan tort terhadap defendan pertama, plaintif telah secara nyata meninggalkan tuntutan yang berasaskan tort kecuaian terhadap defendan pertama. Peninggalan ini harus dilihat dari sudut kes yang diplidkan plaintif, yang mana adalah diasaskan kepada tort kecuaian. Adalah jelas bahawa pengakuan ekspres dan berulangkali plaintif di atas telah menghapuskan substratum tuntutannya.

(4) Oleh yang demikian, kami tidak dapat bersetuju dengan keputusan hakim bicara memberikan penghakiman kepada plaintif berasaskan tort kecuaian, dan seterusnya menjawab persoalan di atas secara afirmatif.

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 16

For the appellant - Ben Chan (Choo Mun Wei with him); M/s Mah-Kamariyah & Philip Koh
For the respondent - Dato' Bastian Vendargon; M/s YS Woo & Proctor

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Low Hop Bing JCA:

Appeal

B **[1]** This appeal was lodged by the appellant ("the first defendant") against the decision of the High Court in:

(1) allowing the respondent's ("the plaintiff's") claim against the first defendant;

C

(2) granting a declaratory order that the first defendant was negligent in honouring Perwira Habib Bank cheque No. 51300 dated 26 July 1991; and

(3) directing the first defendant to refund to the plaintiff the sum
D of RM231,393 with interest at 8% p.a. from 18 March 1993 to the date of realization, and costs.

[2] On 3 September 2010, we allowed the first defendant's appeal, set aside the order of the High Court and substituted it
E with an order dismissing the plaintiff's claim with costs of RM10,000 here, and RM15,000 in the court below. We now give our grounds.

Facts Of The Case

F **[3]** The plaintiff (PW1) was the sole proprietor of Omar Khayam Enterprises ("the customer") and had opened Current Account No. 1102052687 with the first defendant ("the bank"). (The expressions "PW1" "the plaintiff" and "the customer" are used interchangeably in our judgment).

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[4] As at August 1990, the bank had given the customer banking facilities amounting to RM15 million. On 22 December 1990, an extra overdraft facility of RM300,000 was given to the customer.

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[5] PW1 authorized his son (PW2) to sign all cheques for and on his behalf.

[6] The overdraft facility of RM300,000 was secured by PW2's guarantee together with the pledge of PW1's fixed deposit of
I RM200,000.

[7] By letter of 31 January 1991, the plaintiff informed the bank that a company known as Omar Khayam Enterprise Sdn Bhd ("the company") had been incorporated and requested that the banking facilities enjoyed by the customer be transferred to the company. The bank acceded to PW1's request, subject to the conditions that PW1 and PW2 execute a fresh guarantee for RM15.3 million; and PW2 replace the earlier guarantee by a fresh guarantee. Both PW1 and PW2 had fulfilled these conditions.

[8] PW1 testified that:

(1) The overdraft facility of RM300,000 was never utilized; and

(2) On or about 15 May 1991, PW2 and one Rajab Sultan had sold all the shares in the company to one Sallim bin Mohamed (Sallim) and two others for RM550,000, of which a deposit of RM100,000 was paid, while the balance of RM450,000 was to be paid by 15 July 1991.

[9] According to PW1 and PW2, the said balance of RM450,000 was not paid by 15 July 1991. However, on 26 July 1991, PW1 received a Cashier's Order for RM300,000 from Sallim who had purchased it from the bank. The bank issued the Cashier's Order in the name of the plaintiff.

[10] There was a final balance of RM150,000. According to PW1, this final balance has not been paid to date, as Sallim has been imprisoned in Singapore on fraud and forgery charges sometime in April 1992.

[11] Later on, PW2 informed PW1 that the Cashier's Order had actually been obtained *via* the company's overdraft account with the bank.

[12] Unknown to PW1 and PW2, Sallim had gone to the bank and cashed cheque No. 531060 dated 26 July 1991 for RM300,000 on the company's overdraft account. The cheque was signed by Sallim only, in breach of the directors' resolution of the Company dated 25 July 1991, which required all cheques to be signed by two signatories *viz* Sallim and PW2.

[13] The bank denied having received the directors' resolution. Previously, PW2 was the sole signatory. On 21 August 1991, by another directors' resolution, PW2 informed the bank that all cheques must be signed by both PW2 and Sallim.

[14] PW1 and PW2 then complained to the bank's manager (DW3) about the allegedly wrongful withdrawal.

[15] On 15 April 1993, without PW1's knowledge and consent, the bank uplifted the Fixed Deposit Receipt No. 049675 pledged by PW1 to the bank as a set-off against the overdraft account. A sum of RM233,155 was uplifted on 15 April 1993.

Question For Determination

[16] First defendant's learned counsel Mr Ben Chan, assisted by Ms Choo Mun Wei, referred to the admission by the plaintiff's erstwhile counsel in the High Court that the plaintiff's claim was not founded on tort and that there was no cause of action in tort against the first defendant, in which case, the plaintiff has abandoned his claim based on negligence against the first defendant. They urged the court to dismiss the plaintiff's claim.

[17] The plaintiff's learned counsel Dato' Bastian Vendargon relied on O. 15 r. 16 of the Rules of the High Court 1980 and urged this court to enter a declaratory judgment for the plaintiff and to order the first defendant to refund to the plaintiff the sum of RM231,393 with interest, based on breach of contract instead, as the court could still make a declaratory order in the absence of such pleading.

[18] In this appeal, the simple and straightforward question which we are asked to answer is:

> Has the plaintiff's admission, that his claim against the first defendant was not based on the tort of negligence and that the plaintiff has no cause of action in tort against the first defendant, removed the substratum of his claim against the first defendant?

[19] The answer to this question would require a discussion on the scope of O. 15 r. 16; and the effect of the plaintiff's admission as alluded to above.

Scope Of O. 15 r. 16

[20] We shall first embark on an analysis of the provisions regulating declaratory judgment under O. 15 r. 16 which reads:

Declaratory judgment (O. 15 r. 16)

16. No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[21] We are mindful that while no action shall be open to objection on the ground that a merely declaratory judgment or order is sought, it must however be immediately emphasised that the power of the court in this regard, though unlimited, is discretionary. This power must be exercised judicially, based on established judicial principles, in the light of the facts and circumstances prevailing in each particular case, including the pleadings by which the parties are bound. The exercise of that discretionary power must not be unprincipled. In this connection, the declaratory judgment or order sought in the plaintiff's prayer must not be construed in isolation. It must instead be construed conjunctively with the plaintiff's statement of claim in its entirety.

[22] In essence, the relevant averments in the plaintiff's statement of claim are pleaded as follows:

(1) Defendant **negligently** allowed the said Sallim bin Mohamad to cash a cheque no. 531000 dated 26 July 1991 belonging to the said Limited Company for RM300,000 without the signature of the second defendant. As a consequence the said Overdraft Facility was completely utilized. (para 11);

(2) Despite the 1st defendant's above **negligence**, the 1st defendant then wrote to the 2nd defendant stating that the 1st defendant intended to uplift the said fixed deposit receipt which at that point of time amounted to RM231,393 in order to reduce the said Overdraft Facility of RM300,000. (para 12);

(3) Further the 1st defendant was **negligent** in accepting a letter from the 2nd defendant and/or Omar Khayam Enterprise Sdn Bhd to uplift the fixed deposit when the proper party to give the consent was the plaintiff. (para 16);

(4) An order and declaration that the 1st defendants were **negligent** in honouring Perwira Habib Bank Malaysia Bhd cheque no. 531000 dated 26 July 1991 ... (para 18: prayer (c)). (emphasis added)

[23] The omnipotent words "negligently", "negligence" and "negligent" appear in the aforesaid paragraphs of the plaintiff's statement of claim. It is as clear as crystal that the plaintiff's statement of claim is an illustration of a classic case based on the tort of negligence, and not based on a breach of contract. The expression "breach of contract" had never appeared at all; to say the least, it is non-existent.

[24] We find it necessary to look at para 12 at p 406 of the record of appeal where it was expressly stated for the plaintiff "that the plaintiff's cause of action is not in tort but for breach of contract". The plaintiff's stand is repeated in para 17 at p 407 *ibid* ie, "The plaintiff has no cause of action in tort against the 1st defendant, as the OD was given to OKESB and not to the plaintiff". This leads us to an examination of the effect of the plaintiff's admission.

Effect Of Plaintiff's Admission

[25] Given the plaintiff's aforesaid express and repeated admission that his claim against the first defendant was not based on the tort of negligence and that the plaintiff has no cause of action in tort against the first defendant, we find that the plaintiff has unequivocally abandoned his claim based on the tort of negligence against the first defendant. This abandonment must now be viewed in the light of the plaintiff's pleaded case, which was firmly founded on the tort of negligence. This is clearly demonstrated in the plaintiff's statement of claim.

[26] Plainly, the plaintiff's aforesaid express and repeated admission has removed the substratum of his claim.

Conclusion

[27] Our answer to the above question is in the affirmative. We could not agree with the decision of the learned trial judge in giving judgment for the plaintiff based on the tort of negligence. We therefore allowed the first defendant's appeal, set aside the order made by the court below and substituted it with an order that the plaintiff's claim be dismissed with costs.

[28] After hearing submissions, we fixed costs at RM10,000 here, and RM15,000 in the court below. Deposit to be refunded to the first defendant as the appellant.